

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS. (JR) 713 OF 2009

BETWEEN:

JOSEPH KELANGE
First Plaintiff

AND:

THOMAS KUMUSI
Second Plaintiff

AND:

PETER APOI
Third Plaintiff

AND:

KANAWI POURU – MANAGING DIRECTOR, NATIONAL FOREST AUTHORITY
First Defendant

AND:

NATIONAL FOREST AUTHORITY
Second Defendant

AND:

INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Defendant

AND:

VANIMO FOREST PRODUCTS LIMITED
Fourth Defendant

Waigani: Manuhu, J
2011: 22 December

CONTRACT – Timber rights purchase agreement – Timber permit – Expiry of timber rights purchase agreement – Extension of agreement.

STATUTE – Forest Act 1991 – Timber rights purchase agreement – Timber permit Expiry of timber rights purchase agreement – Effect of expiry on timber permit.

Cases Cited:

No case cited in the judgment

Counsel:

A. Banyamai, for the Plaintiffs

K. Wamp, for First & Second Defendants

I. Mugugia, for Third Defendant

N. Kopunye, for the Fourth Defendant

7th May, 2012

1. **MANUHU, J.:** The Plaintiffs are seeking orders in the nature of declarations that the decision of the First, Second and Third Defendants to allow the Fourth Defendant to keep logging within Blocks 3, 4 and 5 of the Vanimo timber project area was null and void and of no effect and that the Timber Rights Purchase Agreement of 21 April 2008 (the extension agreement) is null and void and of no effect.
2. The facts are not disputed. The Plaintiffs are customary land owners of Blocks 3, 4 and 5. The Third Defendant entered into a 40 year Timber Rights Purchase Agreement (the Agreement) with the landowners on 21 March 1968. The Agreement covered blocks 1, 2, 3, 4 and 5. Block 6 was subsequently included. The Third Defendant, through the Second Defendant, has been issuing timber permits and entering into development agreements with loggers to harvest logs from the project area including Blocks 3, 4 and 5.
3. The Agreement enabled such project agreement to be entered into between the Third Defendant and the Fourth Defendant for the harvest of logs within the project area, namely Blocks 1, 2, 3, 4, 5 and 6 on 5 October 1991. A Timber Permit No. 10-8 (TP No. 10-8) was thus issued to the Fourth Defendant on 31 October 1991. It was for 20 years. Its expiry date was 31 October 2011.
4. While TP No. 10-8 remained current, the Agreement expired on 21 March 2008. The extension agreement was then made on 21 April 2008. It was endorsed by Hon. Belden Namah, Minister for Forest, on behalf of the Third Defendant, and the landowners. The purported extension was in respect of Blocks 3, 4 and 5 only.
5. The "Preamble" of the extension agreement reads:

"A. Whereas the parties are desirous of extending the term of the Timber Rights Purchase Agreement for Vanimo Blocks 3, 4 and 5 from date to expired on 31 October 2011.

"B. The parties are also desirous of ensuring that the Deed of Variation concerning the Vanimo TRP Project Agreement must be signed and executed by the parties

before the Vanimo TRP extension can become legally effective.

"C. The parties note and acknowledge Timber Permit No. TP 10-8 and the Project Agreement for Vanimo TRP the expires on the 31 October 2011.

"D. The Authority recognizes each of the Land Owners and authorized Agents as appearing in the Principal TRP and any change of Agents as listed herein.

"E. The parties note and accept that the persons referred to in paragraph "D" of this PREAMBLE are properly authorized to enter into this Agreement." (sic.)

6. There are no other paragraphs in the extension agreement. The extension agreement then listed names of landowners, agents, respective Blocks and signatures of landowners. The Deed of Variation referred to in Preamble B remains unsigned.

7. It is necessary to understand the extension agreement in the context of a timber rights purchase agreement and a timber permit. A timber permit is dependent on a timber rights purchase agreement. The State acquires rights over customary land with timber resource through a timber rights purchase agreement with the landowners.

8. Section 2 of the *Forestry Act* 1991 (the Act) provides that a timber rights purchase area means an area of customary land over which the State has acquired the rights of felling, cutting, removing and disposing of timber. The State then leases a timber rights purchase area or parts of it to developers to harvest timber. The State issues a timber permit to developers for that purpose. It is an offence under Section 122(2) of the Act for any person to harvest timber in a timber rights purchase area without authority or without a timber permit. Only a person or an entity with a timber permit is authorized to harvest timber in a timber rights purchase area.

9. The effect of this is that termination or expiration of a timber rights purchase agreement also renders impractical and useless a timber permit that is issued against that timber rights purchase agreement. I note that where the term of a timber rights purchase agreement is longer than a timber permit, the latter may be extended "subject to the term of the timber rights purchase agreement." See Section 137 (1B) of the *Act*. On the other hand, it is clear and I am so satisfied that a timber permit cannot stand on its own. It must be made pursuant to an existing timber rights purchase agreement.

10. In this case, the Agreement expired on 21 March 2008. Was it extended on 21 April 2008? I have to answer this question in the negative for two reasons. Firstly, paragraph "A" of the Preamble is a mistake. It proceeded on the basis that the Agreement would expire on 31 October 2011 when it had already expired on 21 March 2008. There was no valid timber rights purchase agreement in place for the purported extension to take effect from 31 October 2011.

11. Secondly, the extension agreement relates to what the signatories wanted to do after 31 October 2011. It is not a proper agreement to extend any agreement. It is a statement of intention to extend the Agreement. The extension agreement did not and was not intended to address the issue of expiration of the Agreement on 21 March 2008, and the period between 21 March 2008 and 31 October 2011. The extension agreement is obviously not a legitimate extension agreement because it does not state the period of the extension.

12. The natural consequence of all these is that there was no valid extension of the Agreement upon which TP. No. 10-8 could stand. It means that as of 21 March 2008, Blocks 3, 4 and 5 were not under any timber rights purchase agreement. This was the status of Blocks 3, 4 and 5 on 21 March 2008. This was the status of Blocks 3, 4 and 5 when this matter was heard. This is the present status of Blocks 3, 4 and 5. Any logging operation pursuant to TP. No. 10-8 in respect of Blocks 3, 4 and 5 from 21 March 2008 to date would not be in accordance with any valid agreement.

13. It remains for this Court to determine whether it can be implied that the Third Defendant and the landowners intended to extend the Agreement. I am unable to imply extension because first, the purported extension agreement proceeded on the basis that the Agreement would expire on 31 October 2011 when it had already expired on 21 March 2008. This was either an honest mistake or the result of some unconscionable conduct. You only have to look at the document to ascertain that it had expired. Forty years from 1968 is 2008. How could anyone be mistaken? I am reluctant to imply extension in this circumstance.

14. I am also reluctant to imply terms because there are statutory requirements which must be considered before an extension can be made. For instance, see Section 54 to 60. Timber resource agreements are not to be taken lightly and should not be extended outside the scope of the Act. This is to avoid abuse and exploitation of timber resource. Compliance with the provisions of the Act must be shown before a term can be implied. In this case, a mere statement of intention to extend the Agreement, based on a mistake, is, in my view, not a proper basis for the Court to imply extension of the Agreement. I am reluctant to give the extension agreement a meaning more than what it clearly states – that it is a statement of intention to extend.

15. Thirdly, the extension agreement is self-executing. Preamble B read:

"The parties are also desirous of ensuring that the Deed of Variation concerning the Vanimo TRP Project Agreement must be signed and executed by the parties before the Vanimo TRP extension can become legally effective."

16. The parties wanted the Deed of Variation to be signed before any extension can be given legal effect. The Deed of Variation has not been executed. To imply extension in the circumstance would not be consistent with the intention of the parties.

17. In the end, I find that the Agreement expired on 21 March 2008 and the same was not extended. Accordingly, TP. No. 10-8 ceased to have operational effect on 21 March 2008. Any timber harvest or logging operations from 21 March 2008 to date in respect of Blocks 3, 4 and 5 were done without any agreement or arrangement that is recognized under the Act.

18. The following declarations and orders are consistent with the findings:

(a) The Vanimo Timber Rights Purchase Agreement of 21 March 1968 expired on 21 March 2008;

(b) Timber Permit No. 10-8 ceased to have operational effect upon expiration of the Vanimo Timber Rights Purchase Agreement of 21 March 1968 on 21 March 2008.

(c) The Vanimo extension agreement that was entered into between the landowners of Blocks 3, 4 and 5 and the Third Defendant on 21 April 2008 was not a legitimate agreement to extend the Vanimo Timber Rights Purchase Agreement of 21 March 1968;

(d) The Vanimo extension agreement that was entered into between the landowners of Blocks 3, 4 and 5 and the Third Defendant on 21 April 2008 was not a legitimate agreement to save and extend Timber Permit No. 10-8;

(e) All timber logging operations in Block 3, 4 and 5 after 21 March 2008 were not carried out in accordance with any agreement made or permit issued pursuant to the Act and such logging operation are illegal and unlawful.

(f) Cost follows the event.

Baniyamai Lawyers: *Lawyer for the Plaintiffs*

Blake & Dawson: *Lawyers for the First & Second Defendants*

Solicitor General: Solicitor-General: *Lawyer for the Third Defendant*

Bradshaw Lawyers: *Lawyer for the Fourth Defendant*